No. 97-1252

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JANET RENO, Attorney General, *et al.*,
Petitioners,

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION, JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS, JEWISH POLICY CENTER, CHRISTIANS' ISRAEL PUBLIC ACTION CAMPAIGN, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: April 16, 1998

QUESTION PRESENTED

Amici curiae address the following questions only:

(1) Whether the First Amendment prohibits the federal government from conducting deportation proceedings against aliens who engage in fundraising activities for an international terrorist organization with full knowledge of the organization's terrorist activities, where the government cannot demonstrate that the aliens had specific intent to advance the organization's terroristic goals, but rather an intent merely to advance the organization's nonviolent goals.

(2) Whether the Fifth Amendment prohibits the federal government from conducting deportation proceedings against aliens present in the United States without permission, where the aliens can demonstrate that the federal government is proceeding against them because of their association with an international terrorist organization and is not initiating similar proceedings against those associated with other organizations which are deemed less objectionable by the federal government but which nevertheless also advocate violence and destruction of property.

Amici curiae do not address jurisdictional issues raised by the petition.

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared before this Court as well as other federal courts to ensure that aliens who engage in terrorism or other criminal activities are not permitted to pursue their criminal goals while in this country. *See, e.g., Ogbomon v. United States,* 117 S. Ct. 725 (1997); *Immigration and Naturalization Service v. Elramly,* 117 S. Ct. 31 (1996); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Jewish Institute for National Security Affairs (JINSA) is a non-profit, non-partisan, educational organization committed to explaining the need for a prudent national security policy for the U.S., addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies. Founded as a result of the lessens learned from the 1973 Yom Kippur War, JINSA communicates with the national security establishment and the general public to explain the role Israel can and does play in bolstering American interests, as well as the link between American defense policy and the security of Israel.

The Jewish Policy Center is a § 501(c)(3) organization dedicated to creating, articulating, examining, and advocating conservative approaches to social, economic, and foreign

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

policy issues from the perspective of the Jewish community. By providing a particularly Jewish insight, the JPC hopes to make a unique and valuable contribution to the ongoing policy debates affecting our community, our country, and our world.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Christians' Israel Public Action Campaign is a nonprofit organization that addresses laws and policies related to Israel and advocates a strong U.S.-Israel relationship. CIPAC was founded in 1989 to mobilize support for Israel within the Christian community.

The Popular Front for the Liberation of Palestine has been determined by Secretary of State Madeleine Albright to be a "foreign terrorist organization." The United States has a vital interest in taking strong measures to combat international terrorists who threaten our national security. *Amici* believe that one effective measure is denying American fundraising sources to such organizations. *Amici* do not believe that the U.S. Constitution protects the activities of those who engage in fundraising for such organizations with full knowledge of the organizations' purposes.

Amici submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, the federal government has been attempting since 1987 to deport eight aliens because they have engaged in fundraising for the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization that has proclaimed the United States to be one of its principal enemies. The federal government has been unable to go forward with those proceedings, however, due to an injunction issued by the United States District Court for the Central District of California.

At the time that deportation proceedings were initiated in January 1987, two of the eight Respondents (Khader Hamide and Michel Shehadeh) were permanent resident aliens; the other six were in this country under temporary visas. Two of those six (Aiad Barakat and Naim Sharif) recently were granted temporary resident status pursuant to 8 U.S.C. § 1255a; the other four (Julie Mungai, Amjad Obeid, Oyman Obeid, and Bashar Amer) concede that their continued presence in this country violates the terms of their temporary visas, which have long since expired.

The four non-resident aliens are alleged to be deportable on the ground that they failed to maintain student status (8 U.S.C. § 1251(a)(9)), worked without authorization, or overstayed a visit (8 U.S.C. § 1251(a)(2)). *See* Petition Appendix ("Pet. App.") 79a-81a. The two permanent resident aliens (Respondents Hamide and Shehadeh) initially were alleged to be deportable under 8 U.S.C. § 1251(a)(6)(F)(iii)

(1982) as "members of . . . [an] organization that advocates or teaches . . . the unlawful damage, injury, or destruction of property." Following revision of the immigration laws in 1990, the Immigration and Naturalization Service (INS) added charges against Hamide and Shehadeh under 8 U.S.C. § 1227(a)(4)(B), which renders deportable any alien who "at any time after entry engages in terrorist activity."[2] The two temporary resident aliens (Respondents Barakat and Sharif) were alleged to be deportable for visa violations. Pet. App. 3a-4a. The federal government concedes that, as a result of their recent receipt of temporary resident status, Barakat and Sharif are no longer subject to deportation on the visa violation charges (Pet. at 7 n.4), and there are no other charges currently pending against those two.

Respondents filed suit in federal district court in April 1987, seeking an injunction against the deportation proceedings. They claimed that basing deportation on their fundraising activities for the PFLP violated their rights under the First Amendment. They also claimed that *all* of the charges (including those alleging visa violations) infringed on their constitutional rights against "selective enforcement" because the charges allegedly were filed in retaliation for their association with the PFLP. Pet. App. 5a.[3]

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[2] The term "engage in terrorist activity" is defined under 8 U.S.C. § 1182(a)(3)(B)(iii) to include committing "an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity," including "[t]he soliciting of funds or other things of value for terrorist activity or for any terrorist organization."

[3] Both Respondents and the Ninth Circuit have characterized the "selective enforcement" claims as arising under the First Amendment. Strictly speaking, however, those claims arise under the equal protection (continued...)

The district court issued a preliminary injunction in 1994, barring further deportation proceedings based on the visa violation charges against the non-resident alien Respondents. Pet. App. 138a-150a. It found that those Respondents were likely to succeed on their selective prosecution claims, because they had demonstrated that the INS had not brought similar deportation proceedings against those associated with terrorist groups whose views the federal government endorses or tolerates. *Id.* The U.S. Court of Appeals for the Ninth Circuit affirmed the injunction, but reversed the district court's ruling that it lacked jurisdiction over the claims of the two permanent resident aliens (Respondents Hamide and Shehadeh). Pet. App. 77a-128a.

On remand, Petitioners offered extensive additional evidence to the district court regarding the extent of Respondents' fundraising activities for the PFLP and the widespread nature of the PFLP's terroristic activities. The district court nonetheless refused to dissolve the existing injunction and broadened it to include a prohibition of proceedings against Respondents Hamide and Shehadeh. Pet. App. 44a-76a. The district court also denied a government motion to dismiss the proceedings, which argued that 1996 amendments to the immigration laws had deprived federal courts of whatever jurisdiction they had to hear challenges to the conduct of deportation hearings. Pet. App. 22a-44a.

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[3](...continued)
component of the Fifth Amendment's Due Process Clause, which prohibits prosecutions "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, . . . including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 (1985)(internal citations omitted).

In July 1997, the Ninth Circuit affirmed both the district court's decision on jurisdiction and its decision to keep the injunction in place. Pet. App. 1a-21a. The Ninth Circuit held, with respect to the non-resident alien Respondents, that the government was not entitled to dissolution of the prior injunction (which had previously been affirmed on appeal) because it had failed to "demonstrate[] changed circumstances." *Id.* at 17a.

The appeals court also upheld the preliminary injunction with respect to Respondents Hamide and Shehadeh, holding that the district court did not err in finding both "disparate impact" and "improper motive" in connection with those Respondents' selective enforcement claims. *Id.* at 18a-21a. The Ninth Circuit held that the district court's selective enforcement finding properly relied on evidence "of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property." *Id.* at 19a. The appeals court held that "improper motive" was demonstrated by a showing that Respondents were targeted because of their "associational activities with particular disfavored groups" -- at least in the absence of evidence from the government that those targeted harbored a "specific intent to further the PFLP's unlawful aims." *Id.* at 19a-20a.

Finally, the Ninth Circuit held that, quite apart from any Fifth Amendment "selective prosecution" claim, Respondents had a First Amendment right not to be deported for fundraising activities on behalf of a group (like the PFLP) that engages in *some* activities that are not illegal -- in the absence of government evidence "that group members had the specific intent to pursue illegal group goals." *Id.* at 20a. The court

rejected the government's argument that Petitioners' First Amendment claims should be judged under the more relaxed standards articulated in *United States v. O'Brien*, 391 U.S. 367 (1968)(holding that government has more latitude in restricting expressive conduct than in curtailing pure speech). *Id.* The court held that the *O'Brien* standard "is inapplicable in a case such as this one, in which the restrictions are in effect content-based." *Id.*

REASONS FOR GRANTING THE PETITION

This case raises a number of issues of exceptional importance that warrant review by the Court. In particular, the case raises fundamental questions about the power of Congress and the Executive Branch to control the flow of aliens into this country and to protect American security interests by excluding those aliens deemed to represent a threat to American interests.

In its decision in this case, the Ninth Circuit badly fumbled in its efforts to deal with these national security issues. It announced a broad First Amendment rule that will interfere with the federal government's ability to prevent those in this country from taking steps that will assist international terrorist groups. Read literally, the Ninth Circuit's decision renders unconstitutional several key provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, which prescribes criminal penalties for those (whether aliens or citizens) who knowingly provide material support for organizations (such as the PFLP) that have been designated as "foreign terrorist organizations" by the Secretary of State.

The Ninth Circuit's "selective prosecution" holding is similarly problematical. While conceding to the federal government the right to crack down on those actively engaged in violent, terroristic activity, the Ninth Circuit insists that the federal government must practice agnosticism when it comes to dealing with terrorist organizations and their members. According to the Ninth Circuit, the federal government may not pick and choose among terrorist organizations, deciding that one group represents a threat to national interests while another does not. Pet. App. 18a-21a. That ruling strikes at the heart of the federal government's power to protect national interests, a power that has traditionally been outside the province of the judiciary. The Executive Branch generally would have little reason to crack down on a foreign terrorist organization unless that organization represented a threat to American security interests; it certainly would not want to do so if the organization were deemed to *promote* American interests. The Ninth Circuit's rule requiring the federal government to treat all terrorist groups alike undermines the Executive Branch's ability to conduct foreign affairs in a manner designed to optimize national security, and represents a significant judicial intrusion into matters normally reserved to the political branches of government.

I. THE NINTH CIRCUIT RULING PROVIDES UNWARRANTED FIRST AMENDMENT PROTECTION TO THOSE WHO RAISE FUNDS FOR TERRORIST ORGANIZATIONS

The judiciary has, quite correctly, been extremely reluctant to second-guess Congress and the Executive Branch with respect to immigration and naturalization matters. As this Court has recognized, "`For reasons long recognized as valid, the responsibility for regulating the relationship

between the United States and our alien visitors has been committed to the political branches of the Federal Government.'" *Reno v. Flores,* 507 U.S. 292, 305 (1993) (quoting *Mathews v. Diaz,* 426 U.S. 67, 81 (1976)). The power of the political branches "over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan v. Press,* 347 U.S. 522, 530 (1954). Indeed:

> Few interests can be more compelling than a nation's need to ensure its own security. It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggression of others, constitutional protections of any sort have little meaning.

Wayte v. United States, 470 U.S. 598, 611 (1985).

The Ninth Circuit nonetheless in this case overruled the Executive Branch's determination that national security required initiation of deportation proceedings against Respondents Hamide and Shehadeh. The appeals court held that, regardless of the national security interests at stake, the First Amendment prohibits the Executive Branch from initiating deportation proceedings against aliens who raise funds for terrorist groups, in the absence of proof from the government that the aliens "had the specific intent to pursue illegal group goals." Pet. App. 20a. But it often will be quite difficult for the government to gather such evidence of specific intent, particularly when (as is true of the PFLP) the terrorist group at issue engages in at least *some* non-terrorist activities. The effect of the Ninth Circuit's rule, then, is to eliminate the federal government's ability to cut off the flow

of domestic funds to even the most violent and anti-American of terrorist groups.

The case law cited by the Ninth Circuit does not support its broad interpretation of First Amendment rights. The appeals court relied principally on *Healy v. James*, 408 U.S. 169 (1972). *Healy* held that the First Amendment prohibited a public college from interfering with the associational rights of students who wished to form a local chapter of Students for a Democratic Society (SDS), where the sole reason for the interference was the national SDS organization's advocacy of violent campus disruptions and there was no evidence that members of the local chapter intended to engage in similarly disruptive behavior. *Healy*, 408 U.S. at 188-191. The Court held that students could not be sanctioned solely because of their "association with an unpopular organization" (*id.* at 186) and that "[t]he critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Id.* at 188 (internal citations omitted).

But the Ninth Circuit overlooked the critical distinction between *Healy* and the instant case: Respondents have not been engaged in "mere advocacy." Rather, unlike the students in *Healy*, they have been actively fundraising for a terrorist group.[4] While fundraising is an activity that has

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[4] The Court stated in *Healy*:

> In these cases, it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. *United States v. Robel*, 389 (continued...)

communicative elements, the Court has never suggested that the government is thereby precluded from seeking to regulate the nonspeech aspects of fundraising.

Indeed, there is considerable question whether *Healy* has any application at all in an international context. The U.S. Court of Appeals for the District of Columbia Circuit, for example, has held that *Healy* is limited to cases involving individuals seeking to associate with a domestic organization:

> No court has ever found in the right to freedom of association a right to *represent* a foreign entity on American soil. The cases cited by appellants for this proposition are inapposite because, arising in the domestic context, they do not speak to the crucial issue of representation of foreign entities. *See, e.g., Healy v. James*, 408 U.S. 169 (1972).

Palestinian Information Office v. Shultz, 853 F.2d 932 (D.C. Cir. 1988).

The Ninth Circuit's decision is inconsistent with the more relaxed standard set down by this Court in *United States v.*

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[4](...continued)
U.S. [258,] 265 [(1967)]. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims.

Healy, 408 U.S. at 186. But the line of cases referenced in *Healy* dealt with government efforts to sanction individuals based solely on their membership in a disfavored organization. The Court has never held that "a specific intent to further [an organization's] illegal aims" is required when an individual goes beyond mere association and actually engages in conduct that, wittingly or not, furthers those illegal aims.

O'Brien, 391 U.S. 367, 376 (1968), for judging whether the First Amendment prohibits government attempts to regulate conduct that has both "speech" and "nonspeech" elements. Government regulation of such conduct is justified:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

The Ninth Circuit declined to apply the *O'Brien* standard to this case, on the ground that the restrictions imposed on Respondents' fundraising activities were "in effect content-based." Pet. App. 20a. In so holding, the appeals court has confused the speech and nonspeech aspects of Respondents' fundraising. Such activity is expressive to the extent that it constitutes a show of *political* support for the PFLP, but it is also nonexpressive conduct to the extent that it provides *material* support for a terrorist organization. The federal government has every right to take strong measures to prevent terrorist organizations deemed a threat to American security from receiving material support; such measures do not become "content-based" merely because they pick and choose among terrorist groups in determining which of those groups constitute a threat to American security. So long as the federal government is not targeting Respondents for deportation merely because they have chosen to affiliate themselves with the PFLP, Respondents' First Amendment claims ought to be judged under the *O'Brien* standard. The

Ninth Circuit's failure to apply the proper standard warrants review by this Court.

The Ninth Circuit went on to hold, alternatively, that even if the INS could properly have proceeded with deportation proceedings against Respondents based on a desire to stop their fundraising, the district court had correctly enjoined the proceedings based on a finding (allegedly uncontested by the government) "that the INS targeted [Respondents] for their mere association with the PFLP." Pet. App. 21a. But if, in fact, the government had a mixed motive for seeking deportation, with one motive (preventing material support from reaching terrorist groups) being permissible and the other motive (punishing those who merely associate with terrorist groups) being constitutionally impermissible, then issuing an injunction would not be inappropriate in every case. Rather, in a mixed-motive case, the government is entitled to an opportunity to demonstrate that it would have gone forward with deportation proceedings even if it had not harbored the impermissible motivation. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Accordingly, the Ninth Circuit's alternative rationale adds nothing to its holding and does not provide a reason for this Court declining to grant review.

Moreover, even if the First Amendment were deemed broad enough to protect citizens and/or aliens from *criminal* prosecution for engaging in fundraising on behalf of foreign terrorist groups, it does not necessarily serve as a bar to deportation proceedings, which are civil in nature. In its numerous decisions addressing permissible government restrictions on Communist Party membership, the Court has regularly rested its holdings on that criminal/civil distinction. For example, in *Galvan*, the Court upheld the deportation of

an alien who joined the Communist Party, in the absence of evidence that he joined accidentally. *Galvan,* 347 U.S. at 528. But the Court later limited criminal prosecution under the Smith Act (which prohibited membership in the Communist Party) to those who were "active" members. *Scales v. United States,* 367 U.S. 203, 221-22 (1961). The Court stated that the case would have raised "close constitutional questions" if the Smith Act were construed as criminalizing even "passive" membership in the Party, and that the provision at issue in *Galvan* presented an easier case because it "rested on Congress' far more plenary power over aliens, and hence did not press nearly so closely on the limits of constitutionality as this enactment." *Id.* at 222. *See also, Immigration and Naturalization Service v. Lopez-Mendoza,* 468 U.S. 1032 (1984) (exclusionary rule does not bar use at deportation hearing of admissions made by alien following illegal arrest, because deportation hearings are civil proceedings, not criminal).

Furthermore, the Court's decisions addressing the deportation of Communist Party members have interpreted immigration law as limiting deportation on grounds of such membership to those with a "meaningful association" with the Party; as so construed, the immigration laws do not violate the First Amendment. *See, e.g., Gastelum-Quinines v. Kennedy,* 374 U.S. 469, 471 (1963). It cannot seriously be disputed that engaging in fundraising for an organization constitutes a "meaningful association" with that group. The decision below thus appears to be seriously in conflict with decisions from this Court regarding First Amendment limitations on the government's power to deport aliens based on their membership in disfavored organizations.

In light of the importance of the national security concerns raised by this case, review is warranted in order to resolve the conflict between the Ninth Circuit decision and previous First Amendment decisions of this Court.

II. INITIATING DEPORTATION PROCEEDINGS SELECTIVELY AGAINST MEMBERS OF TERRORIST GROUPS THAT THE GOVERNMENT BELIEVES ARE A THREAT TO AMERICAN SECURITY INTERESTS DOES NOT VIOLATE EQUAL PROTECTION

Respondents Hamide and Shehadeh also claim that the charges brought against them infringe on their constitutional right against "selective enforcement" because the charges allegedly were filed in retaliation for their association with the PFLP. The four non-resident alien Respondents (Mungai, Amjad Obeid, Oyman Obeid, and Amer) make a similar selective enforcement claim; indeed, that claim is the *only* claim raised by the four non-resident alien Respondents, inasmuch as they do not contest the validity of the visa violation charges brought against them.

The Ninth Circuit upheld the selective enforcement claims, finding that Respondents were selected for enforcement proceedings solely because of their association with a disfavored terrorist organization. The appeals court based its ruling on findings both that the government's enforcement policy had a disparate impact on those who associate with the PFLP and that the policy was based on an "impermissible motive" -- a desire to deport individuals who associate with disfavored terrorist groups. Pet. App. 18a-20a.

Evidence submitted by Respondents falls far short of what is necessary to make out a selective enforcement claim. Claims of selective prosecution are governed by "ordinary equal protection standards." *Wayte*, 470 U.S. at 608. In criminal prosecutions, a defendant asserting a selective enforcement claim must demonstrate *both* a "discriminatory effect" *and* a "discriminatory purpose." *Id.* Because of special considerations implicated by judicial inquiry into an exercise of prosecutorial discretion, those two elements of the claim must be satisfied by "exceptionally clear proof." *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987). For the reasons outlined above, an even higher standard of proof should be required when, as here, a selective enforcement claim is made in connection with a civil proceeding.

The Court recently reaffirmed that a selective enforcement claim requires proof that "the Government has failed to prosecute others who are similarly situated to the defendant." *United States v. Armstrong*, 116 S. Ct. 1480, 1488 (1996). A defendant is "similarly situated" to others not charged if the decision to charge the defendant but not other similar offenders was "based upon an unjustifiable standard such as race, religion, or other arbitrary classification . . . including the exercise of protected statutory and constitutional rights." *Wayte*, 470 U.S. at 608. Respondents' claim is thus without merit because they have failed to provide *any* evidence that aliens providing material support to terrorist groups *deemed a threat to national security* are not being targeted for deportation.

In upholding Respondents' selective enforcement claims, the Ninth Circuit cited evidence that the government had not brought similar charges against aliens who had engaged in fundraising for other groups that engage in violent activities.

Pet. App. 18a (citing an alien who raised funds for a Mujahedin guerrilla organization and another who raised funds for the Nicaraguan Contras). But the evidence indicates that those individuals are *not* "similarly situated" to Respondents. The organizations for which they raised funds have not been identified as a threat to national security, as has the PFLP. *See* 62 Fed. Reg. 52,650 (Oct. 8, 1997)(Secretary of State's designation of PFLP and 29 other groups as "foreign terrorist organizations" within the meaning of § 302(a) of the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189(a)).

Incredibly, although the Ninth Circuit found that PFLP fundraisers *necessarily* are "similarly situated" to fundraisers for other groups that "advocat[e] violence and the destruction of property" (Pet. App. 18a), its opinions contain absolutely no rationale for that finding and no discussion regarding what constitutes an appropriate control group. Thus, the appeals court failed to discuss an inevitable effect of its holding: it prohibits the government from taking into account, when deciding whether to seek deportation of a fundraiser for a group that advocates violence, whether the group threatens American security interests.

Contrary to the Ninth Circuit's holding, nothing in the First or Fifth Amendments prohibits the government from so determining. In *Wayte*, the Court's only recent selective enforcement decision involving a claim that a defendant was selected for prosecution based on exercise of First Amendment rights, the Court explicitly recognized that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte*, 470 U.S. at 611. In order to prevail on their claims, Respondents would need to show that "the enforcement policy selected [individuals] for prosecution

on the basis of their speech." *Id.* at 609. But the evidence indicates that Respondents were targeted because their *actions* (providing material support for a terrorist group) threaten American security interests, while the actions of others not targeted do not pose a similar threat. While it is true that Respondents' actions have an expressive component (i.e., the actions constitute an expression of support for the PFLP), the evidence indicates that the decision to target Respondents and not, say, members of the Nicaraguan Contras was based on a nonexpressive component of their actions (the threat to national security caused by the provision of material support to a terrorist group that views the United States as an enemy).[5]

Because of the importance of the issues involved, the Court should grant the Petition in order to resolve the clear conflict between the decision below and this Court's decision in *Wayte* regarding the evidence necessary to establish a selective enforcement claim.

III. THE PFLP IS A PARTICULARLY VIOLENT AND ANTI-AMERICAN GROUP WHOSE ACTIVITIES SHOULD BE RESTRICTED TO THE GREATEST EXTENT POSSIBLE

Review of the decision below is also warranted because of the particularly violent and anti-American nature of the

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[5] The Ninth Circuit's 1997 decision declined to reconsider the propriety of the district court's preliminary injunction with respect to the four non-resident alien Respondents, because it had previously upheld the injunction and Petitioners had failed to demonstrate "changed circumstances that would render continuance of [the] injunction in its original form inequitable." Pet. App. 17a. This Court is not similarly constrained by such prudential considerations, because it has not previously considered the propriety of the injunction.

PFLP. There are very few terrorist groups in the world today that pose as great a threat to American security as does the PFLP. If allowed to stand, the Ninth Circuit's decision is an open invitation to the PFLP to increase its American-based fundraising and to use those funds to increase activities that threaten American lives.

As the Petition indicates, the PFLP recently celebrated the 30th anniversary of its 1967 founding. It has long proclaimed the United States to be one of its principal enemies. Among its many acts of international terrorism, the PFLP has hijacked numerous planes, killed 16 Americans at Israel's Lod Airport, and assassinated the U.S. Ambassador to Lebanon in 1976. Pet. at 2.

One of the PFLP's best-known members was Venezuelan-born terrorist Illich Ramirez Sanchez, better known as "Carlos the Jackel." Carlos received his training from the PFLP and, acting under the auspices of the PFLP, masterminded the kidnapping of OPEC oil ministers in Vienna in 1975. *See,* "Kill the Jackel," Sunday Times of London (Dec. 14, 1997).

The PFLP has been bitterly opposed to the 1993 Oslo peace accords between Israel and the Palestinian Liberation Organization (PLO), has suspended its participation in the PLO, and has been engaged in terrorist activity designed to undermine those accords. It has been implicated in numerous drive-by shooting attacks on Israeli citizens in recent months. *See,* "Israel Arrests 10 Suspected PFLP Members Near Ramallah," Agence France-Presse (Dec. 5, 1997). It recently issued a statement denouncing United States "threats" against Iraq and calling on Arab nations to "defy" the U.S. and "stand up to the policies of Washington." *See,* "Palestinian Group

Denounces `U.S. Threats' Against Baghdad," Agence France-Presse (Nov. 10, 1997).

Surely, given the PFLP's history, the federal government has a strong interest in protecting American national interests by doing all it can to deny funding to the PFLP. Respondents do not dispute that they provided such funding, nor do they dispute that they are well aware of the PFLP's bloody history and its avowed opposition to United States policies. The federal courts have no business providing a shield to those who fundraise in support of such terrorist activity. Regardless whether fundraisers personally support terrorist activity or whether (as Respondents claim) they merely support the terrorist group's nonviolent activities, such fundraisers are undeniably facilitating terrorist acts that threaten America's national security. Given the magnitude of the threat posed by the PFLP, it is particularly important that the Court review the Ninth Circuit's decision, which renders this nation powerless to take steps to deprive its enemies of financial resources.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court grant the Petition.

Respectfully submitted,

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